tiff, a travelling salesman, agreed to perform his duties in a manner satisfactory to the defendant. He was discharged on the ground that his services were not satisfactory in that he failed to notify the defendant of his whereabouts for a period of nine days. *Held,* that the contract required only performance to the satisfaction of a reasonable man, that the defendants' dissatisfaction was unreasonable, and that the discharge was wrongful.

The cases involving such stipulations are of two kinds. In one class the decision of the party to the contract is conclusive, his personal satisfaction being an absolute condition precedent. *Wood Reaping & M. Machine Co. v. Smith* (1883) 50 Mich. 571. In this class, the object of the contract is to gratify taste, or satisfy individual preference, as where a tailor agrees to make a suit to the satisfaction of a customer, or where an artist agrees to paint a portrait satisfactorily. *Schwartz v. Cohen* (1911) 129 N. Y. S. 464; *Claussen v. Vonnoh* (1907) 105 N. Y. S. 102. In these cases the promisee must act in good faith. *Hay v. Hassett* (1916) 156 N. W. (Ia.) 734; *Hawkes v. Daley* (1911) 85 Conn. 16. But if his dissatisfaction is honest, it is not material whether or not it is reasonable. *Crawford v. Mail and Exp. Pub. Co.* (1900) 163 N. Y. 404. In the second class are cases where there is some objective test of proper performance, a test which the court can apply as well as the individual. Here, the condition precedent is that performance shall, in the judgment of the court, pass the test successfully. *Keller v. Clifford* (1897) 165 Ill. 544; *Schmand v. Jandorf* (1913) 140 N. W. (Mich.) 996; *Duplex Safety Boiler Co. v. Garden* (1886) 101 N. Y. 387. Personal service contracts are often such that performance cannot be judged by an objective standard, and personal satisfaction is a condition precedent. The court in the principal case refuses to consider the contract as one involving person taste or fancy, but rather views it as one of the second class, involving merely mechanical or operative fitness. To the contrary, on a similar set of facts, see *Spring v. Ansonia Clock Co.* (1881) 24 Hun (N. Y.) 175; *Sax v. Detroit, G. H. & M. R. Co.* (1900) 125 Mich. 252.

S. J. T.

EVIDENCE—FORMER TESTIMONY—ABSENCE OF WITNESS IN CIVIL ACTION FROM JURISDICTION.—STEPHENS ET AL. V. HOFFMAN ET AL. (1916) 114 N. E. (ILL.) 142.—In an ejectment suit, testimony given at a former trial was offered in evidence. The witness had moved to another state subsequent to the former trial, but no reason was shown why his evidence might not have been taken by deposition. *Held,* that because of the possibility of securing a deposition, the former testimony was inadmissible.

In order that a party may be permitted to introduce testimony given at a former trial of the same issue between the same parties, the law requires that the unavailability of the absent witness be proved. See *U. S. v. Macomb* (1851) 5 McLean, 286, 292; *cf. Lyttle v. Denny* (1909) 222 Pa. St. 395 (deposition). In civil cases it is settled, according to the great weight of authority, that absence from the jurisdiction alone constitutes sufficient grounds for admitting such testimony, even though no

effort has been made to secure either the attendance of the witness or his deposition. *McGovern v. Hays & Smith* (1902) 75 Vt. 104; *Railroad Co. v. Osborn* (1902) 64 Kan. 187; *Wheeler v. Jenison* (1899) 120 Mich. 422; 2 Wigmore, *Evidence,* sec. 1312. An increasing number of courts, however, seemingly impressed with the ease with which depositions may now be procured, require proof that it is impossible to secure a deposition from the absent witness. *Kirchner v. Laughlin* (1890) 5 N. M. 365; *Gastrell v. Phillips* (1886) 64 Miss. 473; *Slusser v. Burlington* (1877) 47 Ia. 300. There would hardly seem to be adequate ground for supporting this departure from the older rule. Former testimony, even though technically hearsay, represents the very highest grade of that class of evidence, having been subjected to the all-important cross-examination and the perjury penalty. See 25 YALE LAW JOURNAL, 405. It is clear, moreover, that a deposition would not be likely to constitute better evidence than the former testimony. If the deposition is claimed to be necessary, why should not the party so contending have the burden of obtaining and offering it? Possibly, as a compromise, it would be fair to require the proponent of former testimony to give timely notice to the opposing party, thus giving the latter ample opportunity to take steps to secure a deposition if he so desires.

S. F. D.

EVIDENCE—WITNESSES—COMPETENCY OF JUDGE.—HALE v. WYATT (1916) 98 ATL. (N. H.) 379.—On an appeal from the probate court's disallowance of a will, the issue being the mental unsoundness of the testator, the appellee introduced the voluntary testimony of the probate judge as to a statement of one of the appellants in inquisition proceedings against the testator before the execution of the will, to the effect that the testator was insane. *Held,* that this voluntary testimony of a judge, as to a statement made at a prior hearing before him, was admissible.

The objections to the competency of a judge as a witness are not based on the general nature of his office, and do not go to the extent of rendering him incompetent to testify in all trials during his term. Wigmore, *Evidence,* Vol. III, sec. 1909; *State v. Duffy* (1889) 57 Conn. 525. They exist chiefly in cases where the presiding judge also acts as a witness, because of formal difficulties in conducting the trial, and the general tendency to lower the dignity of the judicial office. *Rogers v. State* (1894) 60 Ark. 76; *People v. Dohring* (1874) 59 N. Y. 374; *Estes v. Bridgforth* (1896) 114 Ala. 221; *Gray v. Crockett* (1886) 35 Kan. 66; *Ross v. Buhler* (1824) 14 La. 312. The difficulties to be overcome in such cases do not present themselves where a judge, who is not presiding, testifies to a fact which occurred before him at a previous trial. *State v. Houghton* (1904) 45 Or. 110; *State v. Duffy, supra; Welcome v. Batchelder* (1803) 23 Me. 85; *State v. Bringgold* (1905) 40 Wash. 12. On grounds of public policy, however, a judge is not allowed to contradict what he has certified to officially, or to state the grounds on which his decision was based. *Noland v. People* (1905) 80 Pac. (Col.) 887; *I. O. O. F. v. Allmon* (1897) 39 Atl. (Del.) 1098; see *Highberger v. Stiffler* (1864) 21 Md. 338. If the judge's evidence is vitally important, it would seem that the interests of justice demand its admission unless material obstacles present themselves.

R. L. S.